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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

LOYD KENNEDY,
Petitioner,
v.
STATE OF TENNESSEE,
Respondent.
No. 534.

Certiorari to the Supreme Court of Tennessee.

REPLY BRIEF FOR RESPONDENT.

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May It Please the Court:

Inasmuch as the petition is sought to be prosecuted upon the typewritten record, and since counsel for respondent has not been furnished with a copy of such typewritten record, it will be impossible to make apt references to the typewritten record in this reply brief. Instead, an effort will be made to designate the witnesses by whose testimony the facts relied on by the respondent shall appear.

STATEMENT OF THE CASE.

The prosecution in this case grows out of one of those infrequent racial clashes, regretted by both white and black alike, which sometimes occur. The facts of this particular prosecution are stated in the opinion of the Supreme Court of Tennessee as follows:

This case followed racial disturbances at Columbia in February, 1946. There had been a clash between some members of the two races on the afternoon of February 25, 1946. In this trouble, a city policeman was shot, and some members of the State Highway Patrol were sent to Columbia for the purpose of assisting local officers in the restoration of order. After the arrival of the State Patrol, it was decided that at daylight the next morning the patrol would move in and undertake to disarm and arrest persons in the locality of the disturbance. The area was the colored section of the town, extending from Main and Woodland Streets and known as Mink Slide. After daybreak on the morning of February 26, the patrolmen, under the direction of Sheriff Underwood, moved into the area in question. The patrolmen were dressed in their regular uniform, indicating their official capacity, and a number of them were armed with machine and riot guns. They proceeded to go and knock on the doors of the establishments in this locality and notify the occupants, if any, to come out and they would not be harmed. This continued without incident until they reached a barber shop owned by Sol Blair. The testimony of the State shows that when they knocked on the door the patrolmen saw someone in the shop, and noted that this person was armed with a shotgun.

Five witnesses for the State testified that at least one shot was fired toward the patrolmen from the inside of

this building. The shot struck and wounded Austin, one of the highway patrolmen. The patrolmen returned the fire and entered the building. The back door of the shop was locked. In a shower stall at the back of the shop they found the defendant crouched against the wall, with a single-barreled shotgun at his side. This gun contained an empty shell, which, apparently, had been recently discharged. Pillow, who was acquitted, was found crouched down on the floor, under some cover. A double-barreled shotgun was also found in this building when the officers entered. This gun was empty, but two exploded shells were found on the floor. One or two shotgun shells were also found on the person of both the defendant and Pillow, and a sack of shells was found in the barber shop.

Opinion, pp. 2-3.

The preponderance of the evidence is that the shots were fired from the inside of the shop, and before any shots were fired by the patrolmen.

Opinion, p. 5.

ARGUMENT ON POINT 1 OF THE PETITION.

To adequately comprehend the situation, a reference to the relevant Tennessee statutes may be in order. In Maury County, the situs of this trial, the selection of veniremen is governed by a special statute, to-wit, Ch. 45, Private Acts of Extra Session of 1913. This statute is too long and involved to be set out verbatim. Its provisions may be briefly summarized as follows:

By it a jury commission of three members is provided. They are required to meet upon the first Monday in July biennially and to select the names of not less than 750 nor more than 1500 prospective veniremen from the tax rolls of the county or any other reliable source, apportioning the prospective veniremen as near as practicable to the population of the several civil districts of the county. These names are to be placed in a locked box and not less than 10 days prior to the meeting of any term of court, a child of tender years, in the presence of the jury commission, draws from the box the names of the prospective veniremen for such term of court. This Act became effective in September 1913. Presumably the first stated meeting of the jury commission was held in July 1914.

The record shows very definitely that on the first Monday in July 1944, the jury commission for Maury County met and placed in this box the names of 750 veniremen. The two surviving members of the then jury commission, one having died in the interim, testified definitely that the sole source of these names which they placed in this box at that time was the then current or 1943 tax rolls. These jury commissioners testify and it was so found by the trial court after a personal inspection of the tax rolls, that such tax rolls contain no symbols identifying the race of the taxpayer. They testify that in some instances they knew the prospective veniremen but that in others and perhaps

a majority of the cases, they did not know him. They definitely deny any racial discrimination in the selection of these parties. The respondent thinks that subsequent developments bear out the truthfulness of their statements in this respect.

The term of court at which the petitioner was indicted convened on February 25, 1945, and on that morning a grand jury was empaneled. The crime for which petitioner stands convicted was not committed until the following morning. This fact alone should explode the hysterical charges of conspiracy contained in the petition insisting that a few members of the negro race were promptly placed on this jury list to give alleged legality of form to the selection of the grand jury indicting the petitioner.

In Tennessee to be eligible as a juryman one need be but a male more than the age of 21, and either a householder or freeholder, and to be free from conviction of an infamous crime. Neither a literacy test nor the previous payment of any form of tax is required. (Code of Tennessee, Section 9990.) Grand juries in Tennessee consist of 13 members, a foreman appointed by the court for a period of two years (Code of Tennessee, Section 10026), and 12 additional members, these 12 additional members being drawn by lot. The names of all the jurors in attendance upon the opening day of court are placed in a hat or other receptacle, and the first 12 names drawn from this hat constitute the grand jury, in addition to the foreman previously mentioned. (Code of Tennessee, Section 10021.)

In February, 1946, and prior to the beginning of the term of court at which the petitioner was indicted, the jury commissioners of Maury County duly met and, pursuant to statute, a five-year-old child, unable to read or write, drew from the box the names of 109 prospective

veniremen for the ensuing term of court. Of this 109 names so drawn, 10 thereof were definitely shown to have been members of the negro or colored race. These 10 members of the negro race were Malcolm Alderson, L. E. Buford, Will Jones, Sam Kittrell, Maxey Perryman, Jim Russell, Henry Howard, Ewell Lowery, Lewis Nicholson and Ernest Lipscomb. The testimony in the case, without substantial contradiction, shows that all 10 of these parties were members of the negro race. The trial judge so found, and his finding in that respect was expressly approved by the Supreme Court of Tennessee.

Upon the drawing of this venire, it was placed in the hands of the Sheriff of the county for the purpose of being summoned. The method used by the Sheriff for summoning these prospective veniremen was by postcard, notifying them that they had been drawn for jury service and to report upon the day stated on such card. Two or three cards were introduced, and show that they were mailed on February 19, or almost one week before the grand jury was empaneled. Of these 10 members of the colored race who were drawn as veniremen, it is shown that L. E. Buford and Lewis Nicholson had died since their names were placed in the jury box, and that Malcolm Alderson and Ewell Lowery had left the county. Tom Kittrell and Maxey Perryman both testified that they actually received these cards summoning them for jury service, and, being non-desirous of serving on the jury, went to their employers and arranged with them to have them excused from such service. Incidentally, there is no suggestion in the record that the desire to be excused did not proceed solely and alone from the wishes of these individual veniremen. Ernest Lipscomb, another veniremen, seems to be rather illiterate. His testimony is that he could hardly read, and that when his card was received by him his son, who was in school, had to read it to him. His testimony indicates that on the day in question he

came to Columbia, the county seat of Maury County, to be present in response to this card, and that he waited around in the hall or other place outside the court room for quite awhile, and later made inquiry of the foreman of the grand jury if his name was on his list of witnesses. Lipscomb seems to have been completely at a loss upon this occasion, and without initiative to make an investigation as to the cause of his having been summoned. The record fails to disclose what became of Will Jones, Jim Russell or Henry Howard. It is not shown that the cards addressed to them were returned to the Sheriff undelivered. Incidentally, it appears from the record that a desire for jury service was the exception, rather than the rule, in Maury County at this time, for it discloses that of the 109 prospective veniremen summoned for jury service upon this particular time, only 16 thereof, including Ernest Lipscomb, were present. Evidently excuses from jury service were not difficult to obtain on the part of members of either race.

The petition for certiorari makes one statement totally without basis in the record. On page 19 it is stated that it was clear that the names of these members of the colored race were purposefully placed upon the instant panel in an attempt to circumvent the constitutional requirement. With the record showing that these names were placed in this jury box in July, 1944, among numerous other names, and with it showing definitely that they were drawn from this box prior to February 19, 1946, or at least one week prior to the commission of the crime for which petitioner stands convicted, it is obvious that unless this Court credit these jury commissioners with psychic qualities and an ability to foresee events one week in the future, the charge that they were placed upon this panel for the purpose of circumventing the constitutional requirement falls flat of its own weight.

It is perfectly true that the testimony introduced upon this plea in abatement on behalf of the petitioner was to the effect that for a considerable period of time no negro had been known to serve either on a grand or petit jury in Maury County. We recognize that this Court in opinions too numerous to mention, has held that proof of this type makes a prima facie case or creates a presumption that members of the negro race were excluded systematically by reason of their race or color and that it becomes then incumbent upon the prosecution to negative such fact. In this connection, however, we respectfully insist that the holdings of this Court are to the effect that the right guaranteed to persons of any race is to be indicted by a grand jury and tried by a petit jury in the formation of which there shall exist no racial discrimination. One charged with crime obtains no immunity therefrom by virtue of the fact that his ancestors may have been victims of race discrimination. Hill v. Texas, 316 U. S. 400; and Patton v. Miss. (No. 122 October Term 1947), both definitely bear out this insistence. The presumption of racial discrimination arising from evidence showing non-service of members of the negro race upon juries for a protracted period must stand in the same plight as any other presumption of law and should yield to definite proof that members of that race were actually placed upon the jury lists to be summoned for jury service.

Of course, there is no right upon the part of persons charged with crime to either an indictment or trial by a mixed jury. Akins v. Texas, 325 U. S. 398, 403. Likewise, there exists no right to proportional representation upon the venire. Akins v. Texas, supra; Patten v. Miss., supra.

The petition for certiorari contains several inaccuracies in connection with the transcript. For instance, it is stated therein that the veniremen John Griggs, Edgar Brown and J. R. Martin were members of the negro race. There

is not a line of testimony in the transcript tending to show that these parties were negro and even though the erroneous statement on behalf of the petitioner might redound to the advantage of the respondent, the latter desires accuracy as a prime consideration.

The respondent thinks that so far as the grand jury in the present case be concerned, the testimony negatives the presumption that discrimination was intended in the present case. It may be true that the number of negro veniremen drawn from this box at the drawing under challenge was not proportionately that which would have been made had there been a drawing directly proportional to the respective population to the county. But such is not required under the authorities, supra. Criticism also is made of the fact that in the interim 2 of the 10 members of the negro race had died. It has been the observation of respondent that the Grim Reaper makes no discrimination in picking his victims and by the law of average a proportionate number from the white race were also called to their ancestors. Since these names were placed on this list in the box in July 1944 and from a list compiled the previous summer, it is not strange that deaths may have occurred therein. Likewise, complaint is made that 2 of the negro veniremen had removed from the county. The migratory nature of a vast number of our population from 1943 to 1946 is so well known as to require no evidence. After all, fluctuations of residence do occur among both races. There is no intimation these two were chosen because they were going to move.

The respondent respectfully insists that the evidence shows that in the present case there was no systematic nor determined effort to discriminate against the colored race in the setting up of the panel from which the grand jury was drawn in the present case. Ten veniremen from a total of 109 constitutes a fairly reasonable proportion

thereof and certainly where that number of members of the negro race were placed upon the panel, such fact definitely negatives any thought of discrimination as such.

ARGUMENT ON POINT 2.

This contention insists that the plaintiff in error was discriminated against by virtue of his color and race in selection of the trial jury. At the outset, it may be conceded that under the previous decisions of this Court the trial judge was in error in declining to allow the plaintiff in error to show by testimony that for a number of years past no member of his race had been a juror on trial juries. The effect of this showing would be to simply make a prima facie case or create the presumption of subsequent discrimination and cast the burden upon the prosecution to show that there was no discrimination in this particular case. The testimony heard with reference to the method by which the grand jury was drawn showed definitely that no member of the negro race had served upon trial juries in Maury County for a number of years past and we concede such to be the fact. This Court has always reserved to itself the right to make an independent investigation of the record when a constitutional question, such as the one here presented, is involved and for the purpose of such investigation this concession above mentioned is definitely made and so far as the respondent be concerned this Court may investigate this question with this concession added and thus obviate the necessity of remanding the case to the Supreme Court of Tennessee for the introduction of this testimony. Frankly, the respondent desires a decision upon the merits of the constitutional questions here presented, unfettered by any subordinate issue with reference to the exclusion of relevant testimony upon this question.

The transcript shows that 72 veniremen were summoned and appeared for jury service of this cause. Of this num-

ber 13 were excused by the Court for various reasons without tendering them to the parties, leaving a total of 59 who were tendered to the parties as prospective jurors. Of this 59, 4 were member of the race to which the petitioner belongs. The transcript further shows that of the regular jurors summoned for this particular term of court 15, including one member of the petitioner's race, remained after the selection of the grand jury. These 15 were excused by the trial court, he stating as his reason therefor that they had remained in attendance for two days with no cases pending and that for this reason he excused the entire fifteen.

Now it is our insistence that where the jury panel eventually tendered to the parties contains members of his race, such constitutes a definite showing that no discrimination in fact was practiced against him by reason of his race or color. It is perhaps true that the panel as originally constituted did not contain as many members of his race as eventually, but the respondent insists that discrimination must be tested by the jury panel as finally submitted to the parties and not by preliminary jury lists.

But it is contended on behalf of the petitioner that the action of the prosecution in challenging the four members who were tendered to the parties amounted to an unlawful discrimination against him. By statute in Tennessee (Code, Section 10020) in felonies of the grade here involved the prosecution is allowed four peremptory challenges for each defendant on trial. All of the persons of the petitioner's race so challenged were challenged peremptorily by the prosecution.

The very nature of a peremptory challenge indicates that it may be used within the numerical limits provided by the party in question without being called to account for his reason in so doing. So far in the annals of criminal trial, no court that the writer can find after diligent

investigation, has ever held that an error may be successfully assigned upon the use of a peremptory challenge. The only decision the writer can find (State v. Logan, ... Mo. ..., 126 S. W. [2d] 236) holds that the use by the prosecution of its peremptory challenge to strike the names of negroes from the trial jury did not constitute error.

To hold to the contrary would involve this Court in doing by indirection what it has consistently held need not be done. Since the decision in Virginia v. Rives, 100 U. S. 313, this Court has been consistent in holding that a negro on trial is not entitled to a mixed jury composed of members of his own race and of the white race. For this Court now to hold that the prosecutor may not exhaust his peremptory challenges on members of the negro race to the full extent of the statutory number would amount in substance to a holding that a negro on trial would be entitled to a mixed jury. If this Court holds that it is error for the prosecutor to challenge peremptorily each negro who appears upon the trial jury panel, to the extent of the challenges allowable to the prosecution by statute, the only possible conclusion that could be drawn from such a holding is that a mixed jury is an essential ingredient of due process where a member of a particular race be on trial. Such a holding would set at naught a long line of decisions of this Court and would be another step in the direction of complete supervision of all phases of state criminal trials, a condition at odds with state sovereignty and the true purpose of this Court.

It is our insistence that the transcript shows that there was no systematic discrimination against members of the negro race in Maury County in the present case despite the presumption thereof arising from the fact that none had been known to sit upon a grand or petit jury for an extensive period of time. It is a part of the judicial his-

tory of Tennessee that 27 members of the negro race were indicted in connection with the incident growing out of the clash between the two races in Maury County. Of these 25 were indicted in one indictment and the petitioner and his co-defendant in another; 23 of those indicted in the first indictment were acquitted at the hands of an all-white jury and the two who were convicted by the verdict of the jury were later granted a new trial and their cases dismissed upon the ground of the insufficiency of the evidence. In the indictment wherein petitioner is charged, his co-defendant was acquitted at the hands of this same jury. These facts would seem to indicate that the judicial processes of the State of Tennessee accord fair and impartial trials to members of the colored race charged with crime, even though the crime be alleged to have been committed against members of the dominant race.

In conclusion, the respondent respectfully insists that the Supreme Court of Tennessee properly ruled upon the constitutional questions here involved and that the petition should be denied.

Respectfully submitted,

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I hereby certify that I have mailed a copy of this reply brief to Z. Alexander Looby, Nashville, Tennessee, Attorney for the Petitioner.

Nat Tipton.